opinion, be wrong to construe the word "wages" in Part 1 (Item 2) of the Schedule to the Limitation Ordinance as if no such differences existed. Moreover, it is to be remembered that a Statute of Limitation should be construed strictly. As the learned editors of *Maxwell on Interpretation of Statutes* state at p. 287 of the 10th edition: "The defence of lapse of time against a just demand is not to be extended to cases which are not clearly within the enactment....." In my view, it cannot be said that the appellant's claim for Sunday pay and statutory holiday pay is clearly within the words of Part 1 (Item 2) of the Schedule to the Limitation Ordinance and therefore I hold that these provisions do not apply to this claim.

This being my view as to the proper construction of the relevant provisions of the Schedule, it is not necessary for me to consider whether an inquiry and decision by the Labour Commissioner into a dispute as to wages under section 149 is a suit within the meaning of section 3 of the Limitation Ordinance, and since any observations on this point would therefore be *obiter*, it seems to me undesirable to comment upon it.

For these reasons, I am of the opinion the decision of the Assistant Labour Commissioner that the appellant's claim for Sunday and statutory holiday pay was barred by the Limitation Ordinance was wrong. In this connection it is not inappropriate to recall the words of Lord Atkin in *Mohamed Akbar Khan v. Attar Singh.*[2] "The defence," he said, "therefore had to rest upon the Limitation Act, a defence meritorious enough where the defendant has been left in long enjoyment of property, or where from lapse of time the original existence or the discharge of an obligation is left in doubt, but void of all merit where, as here, an original obligation is admitted and a fictitious discharge is falsely alleged." In my opinion the respondent's defence in this case, insofar as it was based upon the Limitation Ordinance, was devoid of merit and it is satisfactory that it has not succeeded. The parties should endeavour to agree the amount which under this judgment becomes payable to the appellant but if they are unable to agree, the matter should be referred to the learned Registrar for inquiry and decision.

Order accordingly.

Solicitors: *K. K. Bezboruah; Donaldson & Burkinshaw.*

SV. P. SIVAGAMI ACHI & ANOR. v. SOHAN SINGH

[O.C.J. (Good J.) April 14, 1958]

[Ipoh — Originating Summons No. 97 of 1957]

Practice and Procedure — "Suit" — Meaning of — Whether Originating Summons is a "suit" — Civil Procedure Code (Cap.7), ss.41, 362 and Chapter 26 — Procedure when asking Court to exercise discretion.

The word "suit" as used in Chapter 26 of the Civil Procedure Code is not limited to what is usually called a "suit" presented by a plaint but includes all civil proceedings such as proceedings by Originating Summons.

Where an applicant is asking the Court to exercise a discretion in his favour, which discretion depends upon the Court being satisfied of the existence of sufficient grounds for something or other, there should be an affidavit setting out the grounds upon which the applicant relies in asking for the exercise of the discretion.

Cases referred to:—

(1) *Bhoopendro Narain v. Baroda Prasad,* I.L.R. 18 Cal. 500.
(2) *Venkata v. Venkatarama,* I.L.R. 22 Mad. 256.
(3) *In re Holloway,* (1894) 2 Q.B. 163, 166.
(4) *In re Fawsitt,* (1885) 30 Ch.D. 231, 233.
(5) *Nathumi Ram v. Musammat Sheo Kuar,* 3 Pat.L.J. 460.
(6) *Doma v. Dayaram,* 48 I.C. 1005.

APPLICATION by way of Summons in Chambers.

H. T. Ong for the applicants.

N. Sharma for the respondent.

Cur. Adv. Vult.

Good J.: — This is an application by way of Summons in Chambers for an order that the applicants may be at liberty to withdraw the proceedings herein (*i.e.* Originating Summons No. 97 of 1957) and to institute fresh proceedings.

The matter is governed by section 362 of the Civil Procedure Code and the question at once arises, and was very properly raised by Counsel for the applicants, whether an originating summons is a "suit" for the purposes of the section. The question is a difficult one since "suit" is not defined in our Civil Procedure Code. In the old Straits Settlements Civil Procedure Code (Cap. 102 in the 1926 Edition) "suit" was defined and was declared to be synonymous with "cause" and "action" and the learned commentator R. G. van Someren in his commentary on the definition put the question whether originating summonses were within it, and pointed out that section 73 would seem to show

that an originating summons is not while sections 81 and 194 would seem to show the contrary. This may not seem to be very helpful, but I refer to it in order to demonstrate that in that Code a certain elasticity of wording enabled the word "action" to be construed in the narrow sense in one place while requiring that it should be construed in a wider sense in other places.

Our section 362 is taken almost verbatim from O.23 r.1 of the Indian Code of Civil Procedure. The Indian Code does not define "suit", and the question whether an originating summons is a suit for the purposes of the corresponding section in that Code has come before the Courts in India on a number of occasions. But as might be expected in that vast sub-continent with its multiplicity and diversity of Courts, the question has been answered in different ways. In *Bhoopendro Narain v. Baroda Prasad*[1] it was held that the word "suit" has not the narrow significance attached to the word "action" in English law; but it embraces all contentious proceedings of an ordinary civil kind, whether they arise in a suit or miscellaneous proceedings. In *Venkata v. Venkatarama*[2] a different view was taken, and it was held that every suit must commence with a plaint, and no proceeding, even being capable of terminating in a decree or an order having the force of a decree, is a suit, if it is not commenced with a plaint. This decision was based upon section 26 of the Indian Code which reads:

> "Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed."

We have in our Code a similar provision in section 41 which reads:

> "Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf."

There appears to be no local authority upon this point and if there is one I have been unable to find it by exhaustive search.

Some little light is thrown on the matter by judicial definitions of the term "originating summons" in England. In *In re Holloway*[3] Lord Esher, M.R., said that an originating summons is that mode of commencing an action by summons which is now allowed instead of commencing it by a writ. And in *In re Fawsitt*[4] Cotton, L.J., said that an originating summons must be treated as a civil proceeding commenced otherwise than by writ in manner prescribed by one of the rules of Court, and consequently as falling with the definition of an action.

While bearing in mind the provisions of section 41 of our Code to which I have already referred, I have come to the conclusion that the decision in the Calcutta case[1] is the right one and that "suit" in Chapter 26 of the Code should not be construed in the narrow sense of proceedings which are instituted by the presentation of a plaint. I find myself almost driven to this conclusion by the absence of any corresponding independent procedure applicable to originating summonses, and also by the marked *lacuna* which would exist in Chapter 25 of the Code if "suit" were to be construed in the narrow sense therein. That chapter deals with the abatement or non-abatement, as the case may be, of suits on the death, marriage and insolvency of parties and, in this context, I am convinced that the legislature used the word "suit" in the sense of civil proceedings. For these reasons, I am satisfied that section 362 applies to this application and that I have jurisdiction to exercise my discretion under sub-section (ii) to give the applicants liberty to institute a fresh suit if the conditions contained in sub-paragraphs (a) or (b) of the sub-section are fulfilled. This is the next question which has to be considered in the present proceedings.

It has been held in Indian cases on the corresponding section that the words "other sufficient grounds" in sub-paragraph (b) must be construed as *ejusdem generis* with "formal defect" in sub-paragraph (a), but it is difficult to see what "sufficient grounds" in the nature of a formal defect could exist which would not be covered by the description "formal defect" itself. The object of the rule is discussed in *Nathumi Ram v. Musammat Sheo Kuar*[5] where it is stated that it is not to enable a plaintiff after he has failed to conduct his suit with proper care and diligence and after his witnesses have failed to support his case, to obtain an opportunity of commencing the trial afresh in order to avoid the result of his previous misconduct of the case and prejudice the opposite party. And in *Doma v. Dayaram*[6] the object of the rule is stated to be to prevent a defeat of justice on technical grounds. Where no formal defect necessitating failure of the suit is shown to exist there must still be a defect which has the effect of shutting out a fair trial on the merits and arises out of some error made in good faith by the plaintiff which can only be effectively set right by a trial *de novo*.

I have, however, come to the conclusion that I am not in a position to consider this

question on the material before me for the reason that the Summons in Chambers has been filed without any supporting affidavit. It seems to me that where an applicant is asking the Court to exercise a discretion in his favour, which discretion depends upon the Court being satisfied of the existence of sufficient grounds for something or other, there should be an affidavit setting out the grounds upon which the applicant relies in asking for the exercise of the discretion. I am placed in a position of peculiar difficulty in considering the present application because while Counsel for the applicants, in the course of his submissions, informed me that the defect which it was proposed to cure by the institution of fresh proceedings was the failure of the applicants to file the statement of account required by section 21(1) of the Moneylenders Ordinance, 1951, it appears from the affidavit which the respondent filed that there are or may be other defects in the proceedings which the applicants might take the opportunity to cure if they were allowed on withdrawal of Originating Summons No. 97 of 1957 to file a fresh originating summons. In my view, the proper course for me to take in these circumstances is to dismiss the present application with costs to the respondent but to give liberty to the applicants to apply and, if they do so apply by a fresh originating summons supported by an affidavit setting out the grounds upon which they ask for the exercise of my discretion in their favour, the sufficiency of those grounds can then be considered on their merits; and I order accordingly.

Order accordingly.

Solicitors: *Cheang Lee & Ong; N. Sharma.*

ABU BIN HUSSIN v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Good and Neal JJ.) April 28, 1958]

[K.L. — F.M. Criminal Appeal No. 12 of 1958]

Criminal Law and Procedure — Confession — Failure of trial Judge to direct jury as to truth or otherwise of — Retrial.

The appellant in this case had been convicted of murder and sentenced to death. At the trial he elected to give evidence on his own behalf. He admitted having made a voluntary statement to the Magistrate but denied the correctness of the recorded statement, and gave a version of what happened which briefly was to the effect that he had been out shooting wild boar and had shot the deceased and the witness by accident. The learned trial Judge in his charge to the jury said with regard to the recorded statement: "Accused denied making certain statements recorded in the confession. If you reject the evidence contained in the confession then you will have to be satisfied that the Magistrate was not telling the truth."

Held: (1) that part of the direction of the learned trial Judge overlooks the fact that two entirely separate and distinct questions had to be considered in relation to the so-called confession: (i) whether in fact the appellant did say the things he was said to have said, and (ii) whether or not these things were true;

(2) the jury should have been told that if they were satisfied that the appellant did make the statement, they should then consider whether it was true and that they should do so by considering it in the light of the rest of the prosecution evidence and in the light of the different story told by the appellant in the witness box. *White v. R.*(1) followed.

Retrial ordered.

Case referred to:—

(1) *White v. R.*, A.I.R. 1945 P.C. 181.

COURT OF APPEAL.

K. C. Chia for the appellant.

Mohd. Salleh bin Abas (Federal Counsel) for the respondent.

The judgment of the Court was delivered by —

Thomson C.J.: — This appellant was tried by a Judge and jury at the Muar Assizes for the murder of a woman, Chua Ng Kiow, on 26th June, 1957. He was convicted and sentenced to death. He appealed against his conviction and on 9th April, 1958, we allowed his appeal and ordered a retrial.

At the close of the evidence in the case there was no room for doubt that the dead woman died as a result of receiving into her body pellets from a gun fired by the appellant. Apart, however, from a statement made by the appellant himself the prosecution evidence probably fell short of establishing that fact and did not throw a great deal of light on the surrounding circumstances.

Apart from the appellant's own statement the prosecution evidence was (and none of it was seriously denied) that the appellant had been supplanted in fairly profitable employment by the dead woman and a man named Loh Boon Teck. On the morning of the shooting, in a kampong near the rubber plantation where the dead woman met her death, he borrowed a shotgun and 14 cartridges on the pretext that he wished to shoot flying foxes. Some time afterwards at least two shots were heard in the rubber plantation and later the dead woman was found dead and Loh Boon Teck was found